theCradle

Our mission is to benefit children...by providing education, guidance and lifelong support on parenting choices. Our commitment is to serve as a partner in creating and sustaining nurturing families.

December 15, 2003

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
2201 C Street NW
Washington, D.C. 20520

Re: Docket No. State/AR-01/96

Pursuant to the instructions of the Department, we are submitting herewith two copies of the comments of The Cradle with respect to the proposed Hague Regulations. These comments were sent electronically to the Department on this date.

Sincerely,

Michael E. Phenner

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2049 Ridge Avenue • Evanston, Illinois 60201-2794 • 847-475-5800 • FAX 847-475-5871
www.cradle.org

COMMENTS

The Proposed Hague Regulations

December 15, 2003

The following comments are submitted on behalf of The Cradle, a not for profit adoption agency organized under the laws of Illinois. The Cradle, founded in 1923, has placed over 14,000 children in its 80 years of service.

Questions about these comments should be addressed to Michael E. Phenner, The Cradle, 2049 Ridge Avenue, Evanston, Illinois 60201. Telephone: 847 448 8759. Email address: mphenner@cradle.org.

Preamble (p. 54080) Recognition of Accredited Agencies

Agencies which are fully accredited by the Council on Accreditation should receive recognition of such status during the initial accreditation cycle. Such recognition will have the beneficial effect of promoting efficiency during the initial accreditation process by eliminating duplication of efforts on the part of both the accrediting and accredited agencies. This is not an unfair advantage to accredited agencies because they will have to comply with all of the additional standards contained in the proposed Regulations, and the accrediting agencies will have to verify such compliance.

96.33(e) Cash Reserves

We suggest this provision be clarified to provide that the cash reserves be determined on the basis of three months operating expenses of the intercountry adoption program, as opposed to the operating expenses of the entire agency.

96.33(g) Risk Assessments

The Cradle's Vice President for Administration is qualified to perform, and has specific responsibility for, risk management functions, including the process for regular review and assessment of risks and obtaining appropriate insurance coverage. In addition, there is a Risk Management Committee of the Board of Directors of the agency which meets on a regular basis. We understand that many well managed agencies have similar risk management controls in place, and we therefore question the requirement of obtaining an "independent"

professional assessment, which will add unnecessarily to the expenses of the agency.

If the Department disagrees, we suggest in any event that there is a need to clarify what is meant by an "independent" review. For example, is it sufficiently independent to have this review performed by the agency's regular outside counsel or insurance consultant?

96.33(h) Insurance Requirements

We believe that an alternative to insurance should be permitted. We understand that the market for adoption agency insurance is very difficult both in the cost of such insurance and its availability. It is possible that the insurance option will become too expensive or not available because of insurance market conditions, in which case financial alternatives such as a letter of credit would be a reasonable alternative providing the same amount of protection.

We support the suggestions we understand have been made by others that the Department provide active assistance to the adoption industry in making it possible to obtain affordable liability insurance.

96.35(b) (5) & (6) Information Provided to Accrediting Agency

We suggest that requiring disclosure of all "written complaints" for a 10 year period is excessively long. Five years of such complaints should be sufficient to provide the accrediting agencies with a reasonable basis to judge the quality of services provided by an adoption agency.

Subsection (5) refers to "written complaints" and subsection (6) refers to "malpractice complaints." The difference is unclear. Many, if not all, of the written complaints called for in subsection (5) will, in one way or another, allege an action or failure to act which could be construed as malpractice. This needs clarification, particularly if the Department changes the time period for written complaints as suggested above. If no change is made in the time periods, we suggest that the term "malpractice complaints" be deleted from subsection (6).

96.37(f) Master's Degree Requirement

We suggest that agency employees who are currently conducting home studies, but do not have a master's degree, should be "grandfathered" as is the case for supervisors provided in Section 96.37(d)(3). Such grandfathering would be subject to the proviso that such employees have significant skills and experience in intercountry adoption, at least a bachelor's degree, and regular access for

consultation purposes to an individual with a master's degree from an accredited program of social work education (or such a degree in a related human service field).

96.39(d) Blanket Waivers

We suggest that the term "blanket waiver of liability" as used here and in Section 96.33(g) needs to be defined. It is certainly appropriate to bar the practice followed by some agencies of requiring adoptive parents to waive all rights to assert any liabilities against their agency. Some of these clauses purport to bar actions against agencies even in the event of malpractice or gross negligence. We assume the Department was intending in this Regulation to bar that kind of "blanket" waiver, but there is a good deal of confusion in the adoption community as to whether or not the Regulation is intended to prohibit all waivers of liability.

In contrast to such obviously inappropriate waivers as described above, we suggest it is appropriate to include clauses pursuant to which adoptive parents assume stated risks inherent in international adoption and agree not to bring any actions arising from such risks. For example, parents may properly be asked to assume the risk that a child may have an undiagnosed medical or mental condition that is unknown at the time of adoption. Assuming the agency has done all it can to obtain medical and social information about the child, has otherwise complied with the Hague Regulations and conducted itself in a professional way with respect to communicating such medical and social information to the adoptive parents, such an assumption of risk and waiver of liability is entirely appropriate.

96.45(c) & 96.46c) Liability for Primary Providers

U.S. agencies must exercise due care in the selection of financially responsible supervised providers, whether in the United States or abroad, and under existing law, agencies can and should be held liable for failing to do so. However, in requiring primary providers to *assume* "tort, contract and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contractual adoption services and its compliance with the standards in . . . subpart F," the Department is effectively creating a new cause of action imposing strict liability on adoption agencies.

We respectfully suggest that making such a fundamental change in the potential liability of adoption agencies is beyond the regulation of international adoption agencies contemplated by the International Adoption Act, and is therefore beyond the authority granted to the Department by the Act. As noted above, agencies should be required to exercise due care in the selection of supervised providers and, under existing law, they can and will be held liable for failing to do

so. To go beyond that and require agencies to assume what amounts to strict liability for specific actions, or failures to act, on the part of foreign entities (for example, in the case of 96.46(c)) is unnecessarily burdensome. There are practical limits to how much one can do to supervise people and entities that may be thousands of miles from one's headquarters in the United States. Moreover, in the context of the litigious society in which we live in the United States, this Regulation may have the effect of encouraging burdensome litigation, the ultimate cost of which will be borne by future adoptive parents.

Finally, we suggest that the Regulation as drafted will seriously exacerbate what is already a very difficult insurance market for international adoption agencies.

96.48 Preparation and Training of Prospective Adoptive Parents

We strongly support this provision, and particularly the reference in subsection (c) (4) to the use of distance learning methods using standardized curricula. This proposed Regulation recognizes that education plays a critical role in setting realistic expectations and making adoptive parents better prepared to parent through adoption. The Cradle believes there is no substitute for the education and training of adoptive parents, and extensive educational programs for adoptive parents have long been a major focus of the agency. The Cradle is the founder of Adoption Learning Partners, a website created to offer e-learning courses on adoption. A comprehensive curriculum offering over 20 hours of instruction in five e-learning courses is available on this website to families preparing for adoption, and over 6,000 users throughout the United States have already availed themselves of this opportunity to prepare for adoption.

96.79 Judicial Review

In order to potentially avoid the time and expense of federal court litigation, we suggest that the Regulations promote the use of alternative dispute resolution processes by the accrediting agencies.

THURSDAY'S CHILD INC.

NOV

Thursday's Child

227 TUNXIS AVENUE, BLOOMFIELD, CT 06002
(860) 242-5941
FAX NO. (860) 243-9898

US Department of State CA/OCS/PRI
Adoption Regulations Docket Room
2201 C Street NW
Washington, DC 20520

October 26, 2003

Re: Docket # State/AR-o/96

To Whom It May Concern:

I am the Executive Director and co-founder with my late husband, of a small non-profit international adoption agency with an office in Bloomfield, CT. We were first licensed in 1981 and have assisted hundreds of families who have adopted children from foreign countries and some from the United States also. This agency was founded out of the years of often negative experiences we had as child advocates and adoptive parents and those of many friends of ours. We conceived of and established a small, personalized, ethical agency that remains involved with the majority of our families for years and watches the children grow and thrive. CT has good laws and a careful and thorough licensing procedure. Our agency was founded for and by adoptive parents and is both family and child centered. My late first husband, Kim Abbot and I established the agency with our own limited funds when we were then parents to three kids, two by adoption, former foster parents and child advocates. I later adopted again as a widowed parent. For years none of our staff or consultants took a salary and I still take a very small, non-competitive salary.

I feel it is crucial for you to know how those of us at small agencies feel about The Hague regulations proposed which will most likely put us out of business. From the time the United States signed the Hague Convention Treaty, we agencies provided input and were regularly assured that the regulations would be reasonable and workable for all agencies. Now that we have reviewed the proposed regulations, it is quite clear, to most small agencies, that we will be unable to comply with these regulations and that many of them make no sense to adoption service providers who have been in the trenches and front lines for years. We were promised, from the beginning, that the federal regulations would not supersede state requirements, but it appears that most state requirements are superseded in most instances.

We are all very aware of the contention that The Hague will reduce costs of international adoption. We feel that is untrue and that the increased costs for agencies will be automatically passed to adoptive parents.

Following are the primary issues in the regulations, which we feel, if carried out, will mean the demise of most adoption services like Thursday's Child There are

additional issues and concerns but these stand out to me as the ones that will affect the largest numbers of people in a negative manner.

1. Some Agencies have spent a long time and between $50,000 and $100,000 to go through the voluntary accreditation process with COA. They were promised it would give them a heard start in complying with federal regulations. Now we have learned that that those who went through this voluntary accreditation will have to re-accredit and the voluntary accreditation is not valid. This protracted and very expensive process hurt the agencies financially and took much of their time, which could and should have been focused on service provision. Our agency and most small ones do not have the staff to be able to do this and even if we could afford it, our program would suffer terribly. Some agencies who tried to jump the gun to be voluntarily accredited either hired an acting executive director while their director worked on the accreditation material, or hired a staff person to do that exclusively. At our agency there is nobody to do it but myself, and no money to hire someone else. The rest of our staff and consultants are not even full time workers.

   Many of us feel that the state licensing divisions should be required to add the accreditation standards to their own and should do this for agencies in their states. A modest fee could be charged to cover this, as some states (not CT) already charge to license private agencies. While the licensing divisions would not be pleased to have this extra work, the adoption community feels they should be mandated to do so. After all, the state agencies already receive considerable Federal funding for various things. It is unreasonable for a private accrediting body or several to profit while small and mid-sized agencies are driven out of business in the next couple of years. Requiring state agencies to do this might be an effective solution. From a business standpoint I know that there are a number of CT agencies that would probably not qualify under the proposed regulations.

2. Under the current proposed regs, all Executive Directors will have to be credentialed and all workers providing adoption services will need to possess MSW degrees. I have been in the adoption field for over 30 years and for more than 22 years at Thursday's Child. Yet, I might not be permitted to continue directing our agency, though I am regularly consulted by the MSW's on our staff and asked for my expertise. The State of Connecticut has given me a permanent waiver due to my years of experience, but apparently this will not be good enough. While we have some MSW's, some of the workers doing homestudies are not MSW's. Many agencies around the country also have adoption workers with credentials in other areas, or only bachelor's degrees and we find that these workers do an excellent job. Many small agencies are run by non-credentialed, but very experienced adoptive parents who established their non-profit agencies. In operating this agency, our best workers have not necessarily been the ones with the credentials, but those with personal, hands-on adoption experience.

3. The regulations require that agencies maintain a large substantial reserve, larger than our entire budget. There are no small or medium sized agencies that can afford to do this. We are all non-profit agencies. Our agency has managed to meet its financial responsibilities, since our inception in 1981, through the donation of my own services for many years and through my

current willingness to be compensated with a very small salary. We absolutely cannot afford to set aside a large percentage of our operating costs. This requirement alone will put most of us out of business quickly.

4. All primary providers will have responsibility for the actions of the lawyers and facilitators we work with in the foreign countries. This is insulting and culturally insensitive. These professionals do not consider themselves to be our employees and I doubt any of them in any country would agree to supervision by agencies here. They are our colleagues and any attempt to change that balance will cause them to terminate their programs with us. This arrogance is one more reason that our country has so many detractors. The lawyers and other professionals in adoption are, or will be regulated by their own governments. Agencies would not remain in business long if they did not use reputable foreign cooperating resources. It is apparent that the intent of the regulations was to improve the ability of agencies here to supervise their foreign counterparts, but this is beyond the ability of any agency here to accomplish. Not even the largest agencies have the means to monitor what occurs in the other countries on a regular basis. We are simply not there all of the time and the foreign practitioners do not have the resources or training to keep the same types of records we do, or have the health care availability or other services. If they did, the need for international adoptions might not exist. We cannot and should not have all liability assigned to agencies here and there is no way we can be expected to police our foreign colleagues.

5. The proposed regulations would require a large amount of liability insurance coverage. This requirement exceeds the intent of the law. Additionally, it has been difficult, if not impossible for many of us to obtain affordable coverage, regardless of our histories, size or lack of claims. An exchange of information with other agencies reveals quotes of $10,000 to $50,000. Our agency has never had a complaint against a lawsuit or us filed. If the regulations are to require extensive coverage, then the Federal Government should provide an affordable means to obtain it.

   It is not reasonable that according to the regulations, all risks financially shall be assigned to the service providers. Agencies' hands will be virtually paralyzed by this and they will be unable to share any risks whatsoever with adopting parents. Even without the other proposed costs, small agencies will not be able to handle this. Agencies have historically had contracts designed to minimize the risk of all parties, but this certainly included themselves. These requirements will place an enormous burden on agencies serving as primary providers. (Proposed Reg. 96.45 (b) (8) and (c).
   These regulations will encourage adoptive parents to pursue actions against their agencies whether or not warranted. The majority of agencies are non-profits with very limited resources. We are simply not in the position to assume risks for the actions and practices of other entities, here in this country or elsewhere, including the independent contractors in other countries. We are charitable organizations and that is why we were granted our non-profit status in the first place. With all of these restrictions, we will become even more focused on the minutiae of business practices and less on our primary missions of helping children and families. We are not denying that parents deserve protection, but we non-profits also deserve some protection from the results of our unreasonably litigious society. In fact,

public policy in many states protects charitable organizations so that they can accomplish their stated charitable missions without undue fear of litigation. Adoption agencies that are *somehow* able to afford the burden of the accreditation may well have difficulty retaining their staff and boards of directors under the present proposed regulations.

6. In a misinformed attempt to give an advantage to agencies not being able to afford accreditation, the proposed regulations state that any agency performing only homestudy services will be exempt, but not if the agency also does post-placement supervisions or performs any other adoption service. **This is very poor professional practice.** No agency these days can easily survive doing only homestudies and that was why our agency slowly expanded into international programs. There are too many agencies with which to compete in our tiny state. However, it is also professionally unethical to do homestudies without follow-up and support to families and children. Many state licensing authorities require such follow-through of their licensed agencies. We do not consider it morally appropriate either, to discharge our responsibilities and abandon our clients upon homestudy completion. Larger agencies have already stated intention not to use small agencies only capable of doing homestudies. Clients would need to switch to another agency for that and some would try to avoid post-placement follow up altogether. If small agencies are unable to develop written agreements with larger agencies they will also go out of business, even if they have been "spared" the costs of becoming accredited and complying with these regulations. If a break is going to be given small agencies, then they should be exempt if they provide only homestudy **and** post placement or follow up services. I still don't think we could obtain enough clients to survive, since there are many other agencies locally providing this.

   I guarantee that many small agencies will choose to fold even without attempting to determine if they can comply with the requirements for accreditation. Many are already sadly speaking of doing so. The ones that remain will not be the best, but the most wealthy and largest.

   People like me, who raised four children alone for many years and made numerous sacrifices for the cause of adoption and for this agency, will not be able to put ourselves in the position of being liable for actions of others, or of investing the majority of our agency's financial resources in being accredited only to find ourselves driven out of business before long, due to being unable to recover such costs by increasing our client base.

   Meanwhile, the large and monied agencies will grow larger and wealthier and prospective parents will no longer have freedom of choice to use services of a friendly, careful and personalized agency like Thursday's Child, because we will not exist. The accrediting bodies chosen (and some have lobbied long and hard) will also grow wealthy.

   The Hague was intended to protect and help children and families around the world. We have seen no evidence that this has been the case in any of the countries that have implemented it. Adoptions have decreased, as well as the children remaining longer in overcrowded orphanages. We have not witnessed

a dramatic increase in local adoptions in other countries, or in improved services to children and families.

Here in the US, the regulations, if allowed to go forward as presented, will also seriously affect families and children. It is not only about agencies, business practices, credentials, funds, liability, etc. ***It is all about people.*** Many small agencies have dedicated employees who will lose their chosen profession though they have been doing an impressive job thus far, at far less compensation than most would have earned at other jobs. For myself, I will find that with over 30 years of adoption expertise under my belt, I will not find employment in my chosen field, to which I have devoted my life. When my husband died in a fire six months after our agency's initial licensure in 1981 and we were left with no home, no insurance and little else, I was urged to get out of the adoption field which was so non-lucrative. Friends advised me to seek employment that would benefit my family. My commitment to adoption and to Thursday's Child made me resist their advice and now, in my late fifties, with a child still at home, I may suddenly find myself out of work, with no pension, no benefits or unemployment insurance, if the proposed regulations go forward without radical changes. Even worse, after over 30 years of adoption experience, I will have no avenue to obtain another job in my chosen field where, according to our clients, I have labored with competence and compassion. Some of our part-time workers who do a wonderful job will also have to seek other types of employment.

To have the Federal Government close good and reputable business because of regulations that we were promised would be reasonable and easy to implement, is beyond outrageous. **It is not too late** to create regulations that are reasonable and human and still do a good job, but allow small agencies to be able to afford to continue.

Some state that The Hague here is a done deal, but laws can also be changed. International adoption agencies are very angry now, except perhaps for a few of the giant-sized ones who believe this will almost create a monopoly for them and will enhance their businesses. When adoptive parents learn how limited they will be, how their costs (already high) will increase and how they will be subjected to cookie-cutter adoption services, they will also become quite angry. At this time they may not be fully aware of all of the implications.

I urge you to go back to the drawing board on these regulations and to listen to the front-line service providers. It is not research or study organizations that really are in tune to the pulse and heartbeat of our field. It is disastrous and ignorant to move ahead with a time line if you are creating a monster and hurting many in doing so. That was not the intention of The Hague at all.

Sincerely,

Iris Arenson-Fuller

Iris Arenson-Fuller, Executive Director,
Thursday's Child, Inc.